168

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No. 09-1333

In the Supreme Court of the United States

FERNANDO CANTO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

In 1996, Congress repealed Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), which provided for a discretionary waiver of exclusion, and replaced it with another form of discretionary relief not available to aliens convicted of certain crimes, including aggravated felonies. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that the repeal of Section 212(c) did not apply retroactively to an alien previously convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief. The questions presented are:

1. Whether this Court's holding in *St. Cyr* applies to an alien who was convicted of aggravated felony counterfeiting offenses and a firearms offense after trial, and who therefore did not relinquish his right to a trial in reliance on potential eligibility for a waiver under Section 212(c).

2. Whether, based on principles of non-retroactivity, the repeal of Section 212(c) is applicable to an alien who was convicted of aggravated felony counterfeiting offenses and a firearms offense after trial, but alleges that he relinquished his right to an appeal in reliance on potential eligibility for a waiver under Section 212(c).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 17

TABLE OF AUTHORITIES

Cases:

Aguilar v. *Mukasey*, 128 S. Ct. 2961 (2008) 7
Armendariz-Montoya v. *Sonchik*, 539 U.S. 902 (2003) ... 7
Atkinson v. *Attorney Gen.*, 479 F.3d 222 (3d Cir. 2007) 8, 11, 12, 13
Cruz-Garcia v. *Holder*, 129 S. Ct. 2424 (2009) 7
De Johnson v. *Holder*, 130 S. Ct. 3273 (2010) 7
Dias v. *INS*, 311 F.3d 456 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003) 10
Ferguson v. *Holder*, 130 S. Ct. 1735 (2010) 7
Ferguson v. *United States Att'y Gen.*, 563 F.3d 1254 (11th Cir. 2009), cert. denied, 130 S. Ct. 1735 (2010) .. 11
Fernandez-Vargas v. *Gonzales*, 548 U.S. 30 (2006) 9, 10
Granados, In re, 16 I. & N. Dec. 726 (B.I.A. 1979) 15
Hem v. *Maurer*, 458 F.3d 1185 (10th Cir. 2006) 11, 13
Hernandez de Anderson v. *Gonzales*, 497 F.3d 927 (9th Cir. 2007) 11
Hernandez-Castillo v. *Gonzales*, 549 U.S. 810 (2006) 7
Hernandez-Castillo v. *Moore*, 436 F.3d 516 (5th Cir.), cert. denied, 549 U.S. 810 (2006) 10

Cases–Continued: Page

Hughes Aircraft Co. v. *United States ex rel. Schumer*, 520 U.S. 939 (1997) 9
INS v. *St. Cyr*, 533 U.S. 289 (2001) 2, 3, 6, 8, 9, 12
Kellermann v. *Holder*, 592 F.3d 700 (6th Cir. 2010) 10
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 8, 9
Laurence v. *Ashcroft*, 540 U.S. 910 (2003) 8
Lovan v. *Holder*, 574 F.3d 990 (8th Cir. 2009) 11, 12
Martin v. *Hadix*, 527 U.S. 343 (1999) 8, 10
Mbea v. *Gonzales*, 482 F.3d 276 (4th Cir. 2007) 10
Molina-De La Villa v. *Holder*, 130 S. Ct. 1882 (2010) 7
Montenegro v. *Ashcroft*, 355 F.3d 1035 (7th Cir. 2004) 6
Montenegro, In re, 20 I. & N. Dec. 603 (B.I.A. 1992) 14
Padilla v. *Kentucky*, 130 S. Ct. 1473 (2010) 15, 16
Ponnapula v. *Ashcroft*, 373 F.3d 480 (3d Cir. 2004) 11, 16
Rankine v. *Reno*, 319 F.3d 93 (2d Cir.), cert. denied, 540 U.S. 910 (2003) 10
Reyes v. *McElroy*, 543 U.S. 1057 (2005) 7
Stephens v. *Ashcroft*, 543 U.S. 1124 (2005) 7
Thom v. *Gonzales*, 546 U.S. 828 (2005) 7
United States v. *De Horta Garcia*, 519 F.3d 658 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008) 5, 11
Zamora v. *Mukasey*, 553 U.S. 1004 (2008) 7

Constitution, statutes and regulations:

U.S. Const., Due Process Clause 5
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1277 2

Statutes and regulations–Continued: Page

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597 2

Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 4978 2

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:

8 U.S.C. 1101(a)(43)(R) 2

8 U.S.C. 1182(a)(2)(A)(i)(I) 4

8 U.S.C. 1182(c) (1994) (§ 212(c)) ..... *passim*

8 U.S.C. 1182(h) 4

8 U.S.C. 1229b 2

8 U.S.C. 1229b(a)(3) 2

8 U.S.C. 1251(a)(14) (1982) 14

8 U.S.C. 1251(b)(2) (1982) 15

18 U.S.C. 472 4

18 U.S.C. 473 4

18 U.S.C. 942(c)(2) (1982) 4

8 C.F.R. 1212.3(h) 3

Miscellaneous:

Exec. Office for Immigration Review, U.S. Dep't of Justice, *FY 2008 Statistical Year Book*, Table 15 (2009), http://www.justice.gov/eoir/statspub/fy08syb.pdf 16

Exec. Office for Immigration Review, U.S. Dep't of Justice, *FY 2009 Statistical Year Book*, Table 15 (2010), http://www.justice.gov/eoir/statspub/fy09syb.pdf 16

Miscellaneous–Continued: Page

54 Fed. Reg. 47,586 (1989) 16
69 Fed. Reg. (2004):
p. 57,826 3
p. 57,828 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 593 F.3d 638. The decisions of the Board of Immigration Appeals (Pet. App. 15a-18a) and the immigration judge (Pet. App. 19a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2010. The petition for a writ of certiorari was filed on April 28, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized some permanent resident aliens domiciled in the United States for seven consecutive years to

apply for discretionary relief from exclusion. While, by its terms, Section 212(c) applied only to exclusion proceedings, it was generally construed as being applicable in both deportation and exclusion proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

Between 1990 and 1996, Congress enacted three statutes that "reduced the size of the class of aliens eligible for" relief under Section 212(c). *St. Cyr*, 533 U.S. at 297. In the Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 5052, which was enacted on November 29, 1990, Congress made Section 212(c) relief unavailable to anyone who had been convicted of an aggravated felony and served a term of imprisonment of at least five years. In April 1996, in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, Congress further amended Section 212(c) to make ineligible for discretionary relief aliens previously convicted of certain criminal offenses, including aggravated felonies, irrespective of the length of the sentence served. See *St. Cyr*, 533 U.S. at 297 n.7. Later that year, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, Congress repealed Section 212(c) in its entirety, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b. The latter section now provides for a form of discretionary relief known as cancellation of removal that is not available to many criminal aliens, including those who have been convicted of an aggravated felony (which, as relevant here, includes a counterfeiting offense that results in a prison sentence of at least a year). See 8 U.S.C. 1101(a)(43)(R), 1229b(a)(3).

In *St. Cyr*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c)

should not be construed to apply to an alien convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for relief under former Section 212(c). 533 U.S. at 314-326. In particular, the Court explained that, before 1996, aliens who decided "to forgo their right to a trial" by pleading guilty to an aggravated felony "almost certainly relied" on the chance that, notwithstanding their convictions, they would still have some "likelihood of receiving [Section] 212(c) relief" from deportation. *Id.* at 325.

On September 28, 2004, after notice-and-comment rulemaking proceedings, the Department of Justice promulgated regulations to take account of the decision in *St. Cyr*. See *Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004). In its response to comments received on the proposed rule, the Department noted cases holding that "an alien who is convicted after trial is not eligible for [S]ection 212(c) relief under *St. Cyr*," and then stated that it "has determined to retain the distinction between ineligible aliens who were convicted after criminal trials[] and those convicted through plea agreements." *Id.* at 57,828. That determination is reflected in the regulations, which make aliens ineligible to apply for relief under former Section 212(c) "with respect to convictions entered after trial." 8 C.F.R. 1212.3(h).

2. a. Petitioner is a native and citizen of Mexico. Pet. App. 3a. He was admitted to the United States as a lawful permanent resident in 1971. *Id.* at 3a, 21a. In January 1982, petitioner was indicted for knowingly passing or possessing more than $144,000 in counterfeit United States currency, and for unlawfully carrying a firearm (a semiautomatic pistol) during the commission

of a felony. Administrative Record 318-325, 329. In March 1983, represented by counsel, petitioner pleaded not guilty but was convicted after a jury trial of three counts of counterfeiting offenses in violation of 18 U.S.C. 472 and 473, and of one count of unlawfully carrying a firearm during the commission of a felony in violation of 18 U.S.C. 924(c)(2) (1982).[1] Pet. App. 3a, 21a-22a. He was sentenced to two years of imprisonment. *Id.* at 3a.

b. In April 2005, petitioner visited his native Mexico. Upon his return to the United States, officers of the Department of Homeland Security determined that he was inadmissible because of his conviction for a crime involving moral turpitude. Pet. App. 3a, 20a-21a. He was placed in removal proceedings and charged with being inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(I), as an arriving alien who has been convicted of a crime involving moral turpitude. Pet. App. 3a, 20a-21a.

At hearings before an immigration judge (IJ) in 2005 and 2006, petitioner, represented by counsel, conceded that his counterfeiting offenses are crimes involving moral turpitude, but requested that the grounds of inadmissibility be waived under Section 212(h) (8 U.S.C. 1182(h)) or former Section 212(c). Pet. App. 3a, 22a. Petitioner also conceded that he had been convicted of an aggravated felony. *Ibid.* The IJ concluded that petitioner was not eligible for relief under Section 212(h) or former Section 212(c) because of his conviction for an aggravated felony, and because, unlike the alien in *St.*

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[1] Under 18 U.S.C. 924(c)(2) (1982), a person convicted of "carr[ying] a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States" was required to be sentenced to one to ten years of imprisonment in addition to the punishment for the underlying felony.

Cyr, petitioner's conviction resulted from a jury verdict rather than a guilty plea. *Id.* at 29a-31a.

c. Petitioner appealed to the Board of Immigration Appeals (Board). The Board dismissed the appeal, concluding, as relevant here, that petitioner's aggravated felony convictions made him ineligible for a discretionary waiver of inadmissibility under former Section 212(c). Pet. App. 15a-18a. The Board explained that, because petitioner's conviction followed a trial rather than a guilty plea, he could not "show[] that he affirmatively abandoned any rights in reliance on the possibility of [S]ection 212(c) relief." *Id.* at 16a (citing *United States* v. *De Horta Garcia*, 519 F.3d 658, 661 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008)). The Board also concluded that, even assuming that reliance could be established by "a sufficiently substantiated claim of having foregone [*sic*] an appeal," there was "insufficient testimony or other evidence in the record of proceedings to support" such a claim here. *Id.* at 16a-17a.

3. The court of appeals denied a petition for review. Pet. App. 1a-14a. The court first rejected petitioner's argument that the application of the aggravated felony bar-to-relief under Section 212(c) violated the equal protection component of the Due Process Clause because a foreign conviction would have been treated differently from his state conviction; the court held that it was "perfectly rational" for Congress to treat foreign convictions differently from domestic ones.[2] *Id.* at 5a.

As relevant here, the court of appeals also rejected petitioner's argument that the application of the 1996 repeal of Section 212(c) to his conviction was impermis-

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[2] Petitioner does not challenge the equal protection holding in this Court.

sibly retroactive. Pet. App. 6a-14a. The court reiterated its previous holding that "a petitioner could not possibly have relied on the continued existence of [S]ection 212(c) relief in deciding to go to trial" as opposed to admitting guilt. *Id.* at 11a (citing *Montenegro* v. *Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004)). The court also rejected petitioner's alternative argument that he could be considered to have reasonably relied on the possibility of Section 212(c) relief when he decided not to appeal his conviction. *Ibid.* The court concluded that the distinction between its analysis in *Montenegro* and that of the Third, Eighth, and Tenth Circuits is "one of fine line drawing," because each court uses a "categorical approach * * * when deciding whether an alien relied on the continued existence of [S]ection 212(c) in forgoing a legal right." *Id.* at 11a-12a.

Addressing the category of aliens who claimed reliance on the continued availability of Section 212(c) relief in making a decision not to appeal a conviction prior to IIRIRA, the court of appeals explained that *St. Cyr*'s logic "cannot necessarily be extended to those aliens convicted at trial." Pet. App. 13a. The court observed that "[i]t is a stretch to think" that aliens who had gone to trial and received sentences of less than five years would "forgo their right to appeal on the off chance that they would be successful, get retried, be convicted again, and then receive a sentence greater than five years." *Id.* at 13a-14a. It thus affirmed the Board's decision that petitioner was ineligible for discretionary relief under former Section 212(c).

ARGUMENT

Petitioner contends (Pet. 9, 22) that *INS* v. *St. Cyr*, 533 U.S. 289 (2001), which involved an alien convicted of

an aggravated felony after a plea agreement, has been misinterpreted by the majority of the courts of appeals and that the availability of relief under former Section 212(c) of the INA should be extended to any alien found guilty of a deportable offense after a jury trial, because retroactivity analysis should not include any consideration of likely reliance. In the alternative, petitioner suggests (Pet. 12), as he argued in the court of appeals, that his decision to forgo an appeal of his conviction "was sufficient to trigger Section 212(c) relief."

The decision of the court of appeals does not warrant further review because petitioner's arguments lack merit. The courts of appeals have correctly recognized that reliance is a significant factor to be considered for purposes of retroactivity analysis, although it may be given different weight in different circuits and there is some variation about whether the requisite reliance must be actual (as opposed to objectively reasonable) reliance. Moreover, petitioner's claim that he could have relied on the availability of Section 212(c) relief when he chose not to appeal his conviction is simply implausible. Finally, the underlying question involves the retroactive effect of a statutory repeal that occurred 14 years ago, and this Court has repeatedly denied petitions urging a similar extension of *St. Cyr*. See, *e.g.*, *De Johnson* v. *Holder*, 130 S. Ct. 3273 (2010); *Molina-De La Villa* v. *Holder*, 130 S. Ct. 1882 (2010); *Ferguson* v. *Holder*, 130 S. Ct. 1735 (2010); *Cruz-Garcia* v. *Holder*, 129 S. Ct. 2424 (2009); *Aguilar* v. *Mukasey*, 128 S. Ct. 2961 (2008); *Zamora* v. *Mukasey*, 553 U.S. 1004 (2008); *Hernandez-Castillo* v. *Gonzales*, 549 U.S. 810 (2006); *Thom* v. *Gonzales*, 546 U.S. 828 (2005); *Stephens* v. *Ashcroft*, 543 U.S. 1124 (2005); *Reyes* v. *McElroy*, 543 U.S. 1057 (2005);

Lawrence v. *Ashcroft*, 540 U.S. 910 (2003); *Armendariz-Montoya* v. *Sonchik*, 539 U.S. 902 (2003).

1. Petitioner contends (Pet. 19-22) that the court of appeals "and several of its sister circuits" are in conflict with this Court's retroactivity analysis. Quoting the Third Circuit's decision in *Atkinson* v. *Attorney General*, 479 F.3d 222, 230 (2007) as a model, petitioner argues (Pet. 22) that the court below erred "by focusing on whether [petitioner] relied on existing law, rather than finding that new 'legal consequences' attached to [his] existing rights." Petitioner's objection lacks merit. As this Court has explained, in determining whether a statute has a retroactive effect, a court must make a "commonsense, functional judgment" that "should be informed and guided by 'familiar considerations of fair notice, *reasonable reliance*, and settled expectations.'" *Martin* v. *Hadix*, 527 U.S. 343, 357-358 (1999) (emphasis added) (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994)).

In *St. Cyr* itself, this Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." 533 U.S. at 321-322 (citation and internal quotation marks omitted). In light of "the frequency with which [Section] 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because the Court concluded that aliens in St. Cyr's position "almost certainly relied upon th[e] likeli-

hood [of receiving Section 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of [Section] 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325. Thus, the likelihood of reliance played an important role in the Court's decision in *St. Cyr*. Petitioner's contrary view—that the prospect of reliance is irrelevant—would make the Court's analysis of guilty pleas in *St. Cyr* superfluous.

In asserting that the court of appeals misinterpreted *St. Cyr*, petitioner relies principally (Pet. 21) on two of this Court's retroactivity cases: *Landgraf* and *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997). Those cases, however, do not support petitioner's arguments. In *Landgraf*, the Court specifically identified "reasonable reliance" as a consideration that "offer[s] sound guidance" in evaluating retroactivity, 511 U.S. at 270, and it quoted that same proposition from *Landgraf* in *St. Cyr*, 533 U.S. at 321, which was decided well after *Hughes Aircraft*. Nothing in *St. Cyr* suggested that any alien who was eligible for Section 212(c) relief before its repeal would remain forever eligible. To the contrary, the Court held that Section "212(c) relief remains available for aliens, *like respondent, whose convictions were obtained through plea agreements* and who, notwithstanding those convictions, would have been eligible for [Section] 212(c) relief at the time of their plea under the law then in effect." *Id.* at 326 (emphasis added).

Moreover, this Court's most recent decision addressing retroactivity in the immigration context explicitly discussed *St. Cyr* and reconfirmed the importance of reliance. In *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006), the Court stated that *St. Cyr* "emphasized that

plea agreements involve a *quid pro quo* * * * in which a waiver of constitutional rights * * * had been exchanged for a perceived benefit * * * valued in light of the possible discretionary relief, a focus of expectation and reliance." *Id.* at 43-44 (citations and internal quotation marks omitted). Distinguishing the situation of the alien in *Fernandez-Vargas* from that of the alien in *St. Cyr*, the Court remarked that, "before IIRIRA's effective date Fernandez-Vargas never availed himself of [provisions providing for discretionary relief] or took action that enhanced their significance to him in particular, as *St. Cyr* did in making his *quid pro quo* agreement." *Id.* at 44 n.10.

Thus, the court of appeals did not err in considering the prospect of reasonable reliance as part of its "commonsense, functional judgment" about retroactivity. *Martin*, 527 U.S. at 357.[3]

2. Petitioner contends (Pet. 9-16) that there is a significant and entrenched conflict among the circuits about the proper interpretation of this Court's *St. Cyr* decision. But the disagreement in the analysis of the circuits is—as the decision below recognized (Pet. App. 11a)—narrow. Nine circuits have declined to extend the holding of *St. Cyr* as a general matter to aliens who were convicted after going to trial rather than pleading guilty. See *Dias* v. *INS*, 311 F.3d 456, 458 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Rankine* v. *Reno*, 319 F.3d 93, 102 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Mbea* v. *Gonzales*, 482 F.3d 276, 281-282 (4th Cir. 2007); *Hernandez-Castillo* v. *Moore*, 436 F.3d 516, 520 (5th Cir.), cert. denied, 549 U.S. 810 (2006); *Kellermann* v.

[3] Petitioner does not challenge the court of appeals' employment (Pet. App. 11a) of a categorical approach as opposed to an individualized, case-by-case analysis of reliance.

Holder, 592 F.3d 700, 705-706 (6th Cir. 2010); *United States* v. *De Horta Garcia*, 519 F.3d 658, 661 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008); *Hernandez de Anderson* v. *Gonzales*, 497 F.3d 927, 940 (9th Cir. 2007); *Hem* v. *Maurer*, 458 F.3d 1185, 1189 (10th Cir. 2006); *Ferguson* v. *United States Att'y Gen.*, 563 F.3d 1254, 1259-1271 (11th Cir. 2009), cert. denied, 130 S. Ct. 1735 (2010). Two circuits have held that no showing of reliance is required and that new legal consequences attached by IIRIRA to an alien's conviction were sufficient to prevent the Board from precluding Section 212(c) relief. See *Atkinson*, 479 F.3d at 231 (3d Cir); *Lovan* v. *Holder*, 574 F.3d 990, 994 (8th Cir. 2009) (following *Atkinson* with little further analysis).

In *Atkinson*, the Third Circuit retreated from dictum in *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (2004), which had suggested that an alien who had not been offered a guilty plea would be unable to establish reliance for purposes of retroactivity analysis, *id.* at 494. The Third Circuit in *Atkinson* held that the repeal of Section 212(c) should not be construed to apply retroactively to "aliens who, like Atkinson, had not been offered pleas and who had been convicted of aggravated felonies following a jury trial at a time when that conviction would not have rendered them ineligible for [S]ection 212(c) relief." 479 F.3d at 229-230.

The *Atkinson* court's analysis was based on the observation that this Court "has never held that reliance on the prior law is an element required to make the determination that a statute may be applied retroactively." 479 F.3d at 227-228. But that result cannot be squared with the rationale of *St. Cyr*, which specifically identified "reasonable reliance" as an important part of the "commonsense, functional judgment" in retroactivity analy-

sis, and then explicitly rested its holding on the assessment that it was likely that aliens who pleaded guilty prior to 1996 had reasonably relied on the possible availability of Section 212(c) relief. See 533 U.S. at 321-323. If the Third Circuit's view that retroactivity analysis turns on the fact of conviction simpliciter were correct, then that entire discussion in *St. Cyr* was superfluous.

Furthermore, the Court's analysis in *St. Cyr* was focused on the prospect of detrimental reliance by an alien who pleaded guilty between 1990, when Congress enacted the bar to Section 212(c) relief for aliens who served more than five years on a sentence for an aggravated felony, and 1996, when Congress repealed Section 212(c) altogether. See 533 U.S. at 293 (describing the facts of *St. Cyr*'s case); *id.* at 297 (describing 1990 enactment); *id.* at 323 (describing circumstances of an alien whose "sole purpose" in plea negotiations was to "ensure" a sentence of less than five years). During that six-year period, from 1990 to 1996, an alien concerned about preserving eligibility for relief under Section 212(c) would have had an incentive to enter into a plea agreement that provided for a sentence of five years or less, rather than go to trial and risk a longer (and disqualifying) sentence, and accordingly may have developed reasonable reliance interests. The aliens in the Third Circuit's decision in *Atkinson* and the Eighth Circuit's decision in *Lovan* were also both convicted after the 1990 narrowing of Section 212(c) relief on the basis of sentence length, on which this Court focused in *St. Cyr*. See *Atkinson*, 479 F.3d at 224; *Lovan*, 574 F.3d at 992.

Petitioner, by contrast, was convicted in 1983—long before the 1990 amendment made the length of a sentence a bar to eligibility for Section 212(c) relief. See

Pet. App. 3a. And he does not contest that his conviction of three felonies made him deportable. See Pet. 2. As a result, preserving eligibility for relief under Section 212(c) could not reasonably have been expected to play any role in his strategic decision about whether to appeal.

In any event, the deviation in the circuits' analysis is narrow, because the Third Circuit nonetheless acknowledged that reliance is "but one consideration." *Atkinson*, 479 F.3d at 231. As a result, its split from the other circuits' analysis extends only to whether a determination of retroactive effect *must* turn on the prospect of reliance. No circuit has denied that a determination of retroactive effect *may* be based on the prospect of reliance. Thus, the court of appeals correctly concluded here that the distinction between its analysis and that of the Third and Eighth Circuits "is one of fine line drawing." Pet. App. 11a.

3. Although petitioner's principal argument concerns the distinction between pleading guilty and going to trial, he also suggests (Pet. 12) that he would prevail under the Tenth Circuit's finding in *Hem*, *supra*, that an alien could establish reliance by focusing on his decision not to appeal a conviction. As the court of appeals concluded, the distinction petitioner seeks to draw with respect to the Tenth Circuit's decision in *Hem* is also "one of fine line drawing." Pet. App. 11a. In any event, petitioner's circumstances are quite distinct from those of the alien in *Hem*, where the alien made an objectively reasonable decision to forgo a right to an appeal that would have put him "at risk of being sentenced to a sentence longer than 5 years * * * making him ineligible for [Section] 212(c) relief" after 1990. 458 F.3d at 1199.

In the court of appeals, petitioner argued that he "could have reasonably been motivated by the availability of [Section] 212(c) relief" when he decided not to appeal because he could "have faced a prison sentence up to 20 years if he were to be reconvicted on the [same] offenses [following appeal]." Pet. C.A. Br. 24-25 (capitalization modified). The court of appeals correctly concluded that "[i]t is a stretch to think" that petitioner might have been motivated to forgo an appeal by the risk of receiving a sentence greater than five years after a successful appeal. Pet. App. 13a-14a. In this case, moreover, even that hypothetical risk would have been entirely irrelevant to petitioner's evaluation of whether to appeal his 1983 conviction, because the five-year-imprisonment ceiling was not added to Section 212(c) until 1990, seven years later. See p. 2, *supra*. Accordingly, petitioner can point to no act or transaction that raises even the prospect of reasonable reliance in his case.[4]

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[4] If petitioner had been considering the availability of Section 212(c) relief in a future deportation proceeding at the time of his criminal proceedings, he might have attempted to plead guilty to the counterfeiting offenses in order to avoid being convicted for unlawful possession of a semiautomatic pistol. Petitioner's firearms conviction could have been expected to result in a charge of deportability under 8 U.S.C. 1251(a)(14) (1982) (applying to those "convicted of possessing or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semiautomatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun"). In such a proceeding, petitioner would have been ineligible to seek Section 212(c) relief long before its 1996 repeal, because that ground of deportation did not have a statutory counterpart among the grounds of exclusion. See *In re Montenegro*, 20 I. & N. Dec. 603, 604-605 (B.I.A. 1992) ("[T]here is no corresponding exclusion ground to the charge of deportability under section 241(a)(2)(C) of the [INA] (previously 241(a)(14) [8 U.S.C. 1251(a)(14)]). Accordingly,

4. Petitioner contends (Pet. 16) that this case presents "[a]n [i]ssue [o]f [n]ational [i]mportance." In fact, however, the issue is of quite limited prospective importance because it pertains to the retroactive effect of a statutory amendment to former Section 212(c) that occurred 14 years ago.

Petitioner notes (Pet. 18) the existence of "numerous decisions among the circuits over the last eight years." But, as the government explained in its brief opposing certiorari (at 15-17) in *Ferguson* v. *Holder*, cert. denied, 130 S. Ct. 1735 (2010) (No. 09-263), those decisions are not a reliable indication of the issue's continuing importance, because the great majority of them involved immigration proceedings that were initiated before *St. Cyr*.

Petitioner also cites (Pet. 16-17) statistics from *St. Cyr* about the frequency with which Section 212(c) relief was granted before 1996, and other statistics about the number of removal proceedings initiated in recent years against criminal aliens. As a general matter, however, the number of grants of relief under former Section 212(c) has declined dramatically in each year since the

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we * * * conclude that the respondent is not eligible for a waiver under section 212(c)."); *In re Granados*, 16 I. & N. Dec. 726, 729 (B.I.A. 1979) ("[W]e conclude that the respondent's conviction for possession of an unregistered sawed-off shotgun does not come within the grounds of excludability which are subject to a section 212(c) waiver."). Although petitioner's counterfeiting offenses were crimes involving moral turpitude (which would not have precluded eligibility for Section 212(c) relief in 1983), petitioner could also have sought relief from deportation directly from the criminal court, in the form of a Judicial Recommendation Against Deportation. See 8 U.S.C. 1251(b)(2) (1982) (repealed 1990); *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1479-1480 & n.5 (2010). Petitioner has not addressed how the firearms charge and conviction would affect his reliance arguments.

2004 promulgation of the regulation implementing *St. Cyr*: by 55% (from 1905 grants to 858 grants) between FY 2004 and FY 2009. See Exec. Office for Immigration Review, U.S. Dep't of Justice, *FY 2008 Statistical Year Book*, Table 15, at R3 (2009), http://www.justice.gov/eoir/statspub/fy08syb.pdf; Exec. Office for Immigration Review, U.S. Dep't of Justice, *FY 2009 Statistical Year Book*, Table 15, at R3 (2010), http://www.justice.gov/eoir/statspub/fy09syb.pdf. Over that same period, the number of applications for relief under former Section 212(c) fell at an even greater rate. In FY 2004, there were 2617 applications; in FY 2008, there were 1281; and in FY 2009, there were 576. That reflects a 78% decline since FY 2004—and a 55% decline just since FY 2008. Moreover, because most criminal defendants plead guilty (see Pet. 17 n.3; *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1485 (2010)), the number of aliens affected by the general rule in the circuits that Section 212(c) does not apply to an alien who was convicted after a trial, therefore, would be only a small fraction of those numbers.[5] Finally, because green cards issued after 1989 expire after ten years, see 54 Fed. Reg 47,586 (1989), nearly all lawful permanent residents who are removable on the basis of pre-IIRIRA convictions (even those who did not leave and re-enter the United States) have already been exposed to immigration authorities at some point since

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[5] Cf. *Ponnapula*, 373 F.3d at 496 n.16 ("[I]n comparison to the holding in *St. Cyr*, the effect of our overall holding is likely to be small. First, the class of aliens affected by this ruling is constantly shrinking in size as the effective date of IIRIRA recedes into the past. Second, * * * many aliens who are within the scope of this holding will nonetheless be statutorily ineligible for [Section] 212(c) relief by reason of having served five years or more in prison. Third, many times more criminal defendants enter into plea agreements than go to trial.").

2000. That shrinks even further the pool of those who might still have new proceedings initiated against them on the basis of pre-1996 convictions.

Thus, there is still every reason to believe that this is an issue of diminishing prospective importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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